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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY RAMON GEROLAGA, JR.,

Defendant and Appellant.

C089457

(Super. Ct. Nos. STK-CR-FE-
2003-0006717 & SF087581A)

Defendant Tony Ramon Gerolaga, Jr., appeals the trial court's denial of his pro. per. petition for resentencing pursuant to Penal Code section 1170.95.¹ Defendant complains the court erred in failing to appoint counsel prior to denying his petition and in determining he was not eligible for relief because he was convicted of attempted murder. Because defendant was not charged with, nor tried on, a theory to which the amendments

¹ Undesignated statutory references are to the Penal Code.

of Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437) could arguably apply, we affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from the trial court's denial of defendant's petition for resentencing as will be discussed herein. To facilitate our review, we will incorporate the facts and proceedings from our unpublished opinion, *People v. Gerolaga* (Aug. 1, 2005, C045811), in defendant's previous appeal from his underlying conviction.²

"Viewed in the light most favorable to the verdicts, the evidence showed that on March 30, 2002, shortly after he cashed a monthly check for tribal benefits, Leonard Starkey was savagely beaten and robbed in a room at the Super 8 Motel on West March Lane in Stockton. Starkey, who was beaten so badly he was in a coma for a month and developed post traumatic cerebral palsy, has no memory of the attack; however, other evidence linked defendant to the crime. Two latent fingerprints taken from the air conditioner in the motel room matched defendant's prints. In addition, a taxi driver (John Lagomarsino) testified he dropped Starkey, a man, and a woman off at the motel at about 2:15 a.m. When shown a photographic lineup sometime later, Lagomarsino picked out a photograph of defendant's girlfriend, Juanita Aguilar, because it looked most like the woman he dropped off. Telephone records showed that after Lagomarsino dropped off Starkey and the other two, multiple telephone calls were made from the motel room to a telephone number at the home of Manuel Martinez. At the time of the calls, defendant and Aguilar were staying at Martinez's home, and Martinez testified defendant and Aguilar were at the house when he left for work at around 9:30 p.m. on the night Starkey

² This opinion is part of defendant's record of conviction and may be properly considered in making the eligibility determination. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 333, citing *People v. Woodell* (1998) 17 Cal.4th 448, 456, review granted Mar. 18, 2020, S260493.)

was attacked. In an interview with police, defendant denied being at the Super 8 Motel that night, although he claimed to have stayed there in the past. At trial, however, defendant admitted he went to the Super 8 Motel that night, but denied assaulting Starkey.

“The evidence further showed that on January 9, 2003, defendant savagely beat Carol Hayes at her home on South Laurel Street in Stockton. Hayes testified that before the attack, defendant had been staying at her house, but she told him to leave on January 6 or 7. On the afternoon of the 9th, defendant came over, ostensibly to pick up some things he had left there. Without warning, he struck her and knocked her to the floor. While he was beating her, he asked her where her purse or her money was. (Hayes had cashed her AFDC check earlier that day.) She told him it was in the kitchen. After beating her bloody, defendant bound her hands with duct tape behind her back, then put duct tape over her eyes. When she told defendant she needed to pick up her daughter by 5:00 p.m., defendant told Hayes her daughter would be taken care of. He then wrapped duct tape around her head, over her nose and mouth. Hayes managed to move her chin so she could gasp a little bit of air through the corner of her mouth. After he taped her nose and mouth, defendant told Hayes that if she called the police, he would come back and shoot her.

“Hayes’s car was later found abandoned in a field near where defendant had been living in a tent. Two latent prints from the trunk of the car matched defendant’s prints.

“Ultimately, defendant was charged in an amended information with seven different counts based on both incidents. With respect to the attack on Starkey, defendant was charged with attempted murder (count 1) and robbery (count 2). As an enhancement, the information alleged that in committing both crimes, defendant inflicted great bodily injury on Starkey causing him to become comatose due to brain injury.

“With respect to the attack on Hayes, defendant was charged with robbery (count 3), attempted murder (count 4), witness intimidation (count 5), auto theft (count 6), and

false imprisonment (count 7). As an enhancement, the information alleged that in committing the robbery and the attempted murder, defendant had inflicted great bodily injury on Hayes.

“The trial court denied defendant’s motion to sever the Starkey counts from the Hayes counts. The jury found defendant guilty of all charges except the attempted murder of Starkey, choosing instead to find him guilty of the lesser included offense of assault with a deadly weapon or force likely to produce great bodily injury. The jury also found all of the enhancement allegations were true.

“After denying defendant’s new trial motion, the trial court sentenced defendant as follows: an indeterminate term of life, plus three years for the enhancement, for attempting to murder Hayes; a consecutive upper term of six years, plus five years for the enhancement, for robbing Starkey; the upper term of four years, plus five years for the enhancement, for assaulting Starkey (stayed); the upper term of six years, plus three years for the enhancement, for robbing Hayes (stayed); a consecutive three years for the witness intimidation of Hayes; a consecutive eight months (one-third the middle term) for stealing Hayes’s car; and a consecutive eight months for falsely imprisoning Hayes.” (*People v. Gerolaga, supra*, C045811 [pp. 2-5].) Our unpublished decision stayed defendant’s sentence for false imprisonment pursuant to section 654 and otherwise affirmed the judgment.

On April 10, 2019, defendant filed a pro. per. petition seeking appointment of counsel and resentencing for his attempted murder conviction pursuant to section 1170.95. The trial court denied his request on April 16, 2019, in an ex parte order that found defendant was not entitled to relief as a matter of law because he was convicted of attempted murder. Defendant timely appealed.

DISCUSSION

1.0 The Trial Court Did Not Err in Denying Defendant's Request for Resentencing

1.1 Senate Bill 1437

Senate Bill 1437, “which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal Code sections 188 and 189, as well as by adding Penal Code section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2-4).” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722-723 (*Martinez*).)

Specifically, “Senate Bill 1437 was enacted to ‘amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.’ (Stats. 2018, ch. 1015, § 1, subd. (f).)

Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability.” (*Martinez, supra*, 31 Cal.App.5th at p. 723.) It then allows individuals to take advantage of these changes through the procedure embodied in section 1170.95. (*Martinez, at p. 723.*)

Section 1170.95, subdivision (a) provides: “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

[¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the

natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.”

There is presently a split of authority concerning whether the ameliorative benefits of Senate Bill 1437 apply to individuals convicted of attempted murder. (See, e.g., *People v. Munoz* (2019) 39 Cal.App.5th 738, 753-760 [not applicable], review granted Nov. 26, 2019, S258234; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008 [applicable], review granted Mar. 11, 2020, S259948.)

1.2 Analysis

Defendant complains the trial court erred in failing to appoint counsel and in determining defendant was not eligible for relief because he was convicted of attempted murder. Because defendant was not convicted on a theory subject to the changes of Senate Bill 1437, we need not decide its applicability to attempted murder.

Assuming arguendo that Senate Bill 1437 could be applied retroactively to the benefit of individuals convicted of attempted murder, here, the amended information did not charge defendant with attempted felony murder³ or attempted murder as an aider and abettor under a natural and probable consequences theory. Nor were there facts presented at trial that would have supported such theories. Rather, defendant, had he been successful in his attempt to kill Hayes by viciously beating her and then duct taping her nose and mouth, would have been the *actual killer*. This renders defendant ineligible for relief as a matter of law because his crime would still qualify as murder under the

³ Nor could defendant have been charged with attempted felony murder because that crime does not exist under California law. (*People v. Billa* (2003) 31 Cal.4th 1064, 1071, fn. 4.)

amended statute. (§§ 189, subd. (e)(1), 1170.95, subd. (a)(3); *Martinez, supra*, 31 Cal.App.5th at p. 723.) Moreover, because of this, the trial court did not violate defendant's right to due process by denying his petition for resentencing prior to the appointment of counsel. (See *People v. Verdugo, supra*, 44 Cal.App.5th at pp. 324, 332-333 [trial court may make initial prima facie review of eligibility for relief without first appointing counsel], rev.gr.)

DISPOSITION

The trial court's order is affirmed.

/s/
BUTZ, J.

We concur:

/s/
RAYE, P. J.

/s/
ROBIE, J.